UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK
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IN RE: WORLD TRADE CENTER DISASTER SITE LITIGATION	**21 MC 100 (AKH)** **06 CV 6987** **"ECF CASE"**

Michelle Haskett-Godbee, as the Administrator and Surviving Spouse of James Godbee, individually and/on behalf of the Estate of James Godbee Jr.; Imani Godbee and Kai Godbee. **Judge Hellerstein**

Plaintiffs

The City of New York, including its, Police Department, Department of Environmental Protection, Department of Health and Mental Hygiene.

Defendants

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AFFIRMATION OF JOHN P. RUDDEN, ESQ. IN PARTIAL OPPOSITION TO LIAISON COUNSEL'S MOTION SEEKING AN AWARD OF COMMON BENEFIT FEES and FOR AN AWARD OF COMMON BENEFIT FEES FOR HASKETT-GODBEE'S COMMON BENEFIT LEGAL WORK

John P. Rudden, an attorney duly admitted to the practice of law in New York State, and the Southern District of New York, affirms the following under the penalties of perjury.

1. I represent the Plaintiff, Michelle Haskett-Godbee, the Administrator and Surviving Spouse of Police Officer James Godbee, and their infant children, Imani Godbee and Kai Godbee, in the matter of Michelle Haskett-Godbee v The City of New York, et al, 06CV6987.

2. This affirmation is submitted in partial opposition to the motion seeking an award of 'common benefit" legal fees submitted by Worby Groner Edelman & Napoli Bern [ECF Doc. 2275,

2276 and 2277], and in support of an award of "common benefit" legal fees to counsel for Haskett-Godbee in connection with the "common benefit" legal work involved in Haskett-Godbee's motion for partial summary judgment filed on January 16, 2010.

3. This affirmation specifically adopts the arguments contained in the letter of Parker/Waichman/Alonso, LLP, dated January 27, 2011 [ECF 2306], the Affirmation of Florrie L. Wertheimer, Esq, filed January 28, 2011 [ECF 2307], and the Affirmation of Edward L.C. Marcowitz, Esq, filed January 28, 2011 [ECF 2308]

4. The Haskett-Godbee motion for partial summary judgment was filed on January 16, 2010. The City of New York has filed its opposition, and a Cross-Motion. Plaintiff filed its opposition to the City's Cross-Motion on March 9, 2010. The City's reply to the Plaintiff's Opposition to the City's Cross-Motion was scheduled to be filed on March 26, 2010; no reply was filed, because the City decided to enter into the Settlement Agreement and a STAY was entered.

5. It is respectfully submitted that the issues raised in the Haskett-Godbee motion impacted the pending actions of every New York City Police Officer, or Firefighter who filed a claim under General Municipal Law, §205-a, or §205-e, and who was awarded either an accident disability retirement, or an accidental death benefit by the Board of Trustees of his/her respective pension fund. It is respectfully submitted that the issues raised by Haskett-Godbee substantially facilitated the settlement negotiations

6. The Haskett-Godbee motion raised the doctrine of "issue preclusion," and argued that the determinations of the Medical Board and the Board of Trustees made during the administrative proceeding before the Pension Fund preclude the City of New York from re-litigating those determinations before this Court. In particular, it was pointed out that the Medical Board was

statutorily obligated to determine if the death was caused by participation in the rescue, recovery and cleanup operations at the WTC after the events of September 11, 2001. Once this determination was made by the Medical Board the legislation mandated that he be *deemed* to have died as a natural and proximate result of an accident sustained in the performance of duty and not as a result of willful negligence on his or her part, and the City of New York should be precluded from contesting the factual determinations of the Medical Board. It is respectfully submitted that all NYC Police Officers or Firefighters who were granted either an accident disability retirement and/or an accidental death benefit underwent substantially similar administrative proceedings, and a decision by this Court would have precluded the City from re-litigationg this issue in every police/firefighter case.

7. Haskett-Godbee, further demonstrated the admissible evidence presented constituted a sufficient factual basis for the grant of partial summary judgment on the plaintiffs' G.M.L. § 205-e claims, and that summary judgment was warranted because there was no genuine issue as to any material fact, and that the plaintiff was entitled to a judgment holding, as a matter of law, that:

> The failure to provide P.O. Godbee with respiratory equipment at the WTC site constituted a violation of Labor Law, § 27-a, and G.M.L. § 205-e, and establishes a "practical or reasonable connection" between the violation of Labor Law, § 27-a, and plaintiff's death. [See: Giuffrida v Citibank Corp., 100 N.Y. 2d 72- 80, 760 N.Y.S. 2d 397 (2003)].

Once again, findings of fact, and conclusions of law, regarding G.M.L. § 205 claims in general, would have had a preclusive effect on the City, because they were parties to the Haskett-Godbee proceeding. Clearly the pending resolution of issues of law regarding claims under G.M.L. § 205 motivated the City's decision to settle all the claims.

8. Although, the City argued that P.O. Godbee could not succeed on his G.M.L.§ 205-e

claim, because he was not injured in an "accident." Although, the City had previously brought this issue, before the Court in a motion, dated, February 20, 2009 which this Court denied, Haskett-Godbee raised additional arguments which were not considered by the Court in its original decision denying the City's motion, and Haskett-Godbee asserts those additional arguments were sufficient to determine, as a matter of law, that the injury was an "accident" within the meaning of G.M.L. 205-e, and clearly led the City to conclude that its position on this issue was without merit, and it was in its interest to settle. Again, this issue benefitted every police officer, or firefighter with a G.M.L. 205 claim. The Haskett-Godbee arguments were unique, and never before raised by liaison counsel and included:.

Namely, plaintiff argued the city's definition of "accident" is pre-empted by the criteria adopted by the Captive Insurance Fund. The purpose of the Captive was to provide a fund to pay the legitimate claims of the first responders, including police officers and firefighters, and to permit the City to adopt a definition of "accident" which specifically excludes only police officers and firefighters from compensation would stand as an obstacle to the accomplishment and execution of the full purposes and objectives of the Captive**.**

In addition to being pre-empted by the legislation creating the Captive, the City is also pre-empted from adopting its definition of "accident" in the WTC litigation, by the enactment of the WTC Death Benefits legislation which specifically nullified this construction of the word "accident" with respect to WTC Death cases. The City of New York is pre-empted and/or precluded[1] from claiming P.O. Godbee's death was not ". . . a natural and proximate result of an accident sustained

[1]. See: Issue Preclusion v Claim Preclusion, Memorandum of Law in Support of Motion, dated January 12, 1010, at pgs 5-8.

in the performance of duty and not as a result of willful negligence on his or her part."[2] The language of Administrative Code, §13-252-1(4) prohibits the City from grafting its definition of the term "accident"onto G.M.L.§ 205-e, at least, with respect to WTC death cases.

During oral argument on July 28, 2009, this Court stated:

> I'm wondering if you can argue that the suddenness of 9/11 causing intense fires and intense fumes and the intense dispersion of toxic objects was not a sudden accident, the consequences of which lingered for a long period of time.[3]

The plaintiff agreed with the Court's observation, but went further and argued that every time P.O. Godbee took a breath and inhaled toxic substances into his lungs there was a separate and distinct "accident" which was sudden, fortuitous, and injurious upon impact, because every microscopic particle of toxic dust injured P.O. Godbee to some degree, and that each succeeding toxic particle aggravated the condition caused by the previously inhaled particles, and eventually led to his death. Not only is this analysis consistent with the criteria set forth in the Captive Insurance Policy, it is perfectly in accord with well settled tort law. In Tobin v. Steisel, 64 N.Y.2d 254, 485 N.Y.S.2d 730, 475 N.E.2d 101 (1985), it was recognized that the causation rule both in tort law and under the workers' compensation statute is that an accident which produces injury by precipitating the development of a latent condition or by aggravating a preexisting condition is a cause of that injury.

Moreover, the City's argument that the City could not be held liable because the"accident" - collapse of the towers - was the fault of the terrorists, not the City of New York,"[4] must fail, because the G.M.L. § 205-e claim is based on the City's violation of a statute, and whether there is a direct or indirect connection between the statutory violation and the injury. Who causes the "accident" is irrelevant.

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[2]: See: Text of Administrative Code 13-252-1(4) reprinted at pg 7of the Affirmation of John Rudden, Esq., dated January 12, 2010.

[3] City Brief 41

[4]. City Brief at 42

Wherefore, it is respectfully requested that the application be denied in it's entirety; or in the alternative that the WGENB firm be required to place 5% of the net recovery of their clients cases into a "Common Benefit Fund" so that attorneys who provided work for the "common benefit" of WGENB or other plaintiffs [including all police officer or firefighters] can present proof at a later date that they are valid stake holders and as such collect a portion of those fees.

Pursuant to 28 U.S.C. § 1746, I declare under the penalties of perjury that the foregoing is true and correct, except to those matters stated upon information and belief and as to those matters, I believe them to be true. Executed this 28th day of January 2011.

Dated: New York, N.Y.
January 28, 2011

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John P. Rudden, Esq.
Attorney for the family of
Police Officer James Godbee